BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE,
NO. 06-432, TERRI-ANN MILLER

CASE NO. SC07-1985

_____/

**RESPONDENT JUDGE TERRI-ANN MILLER'S RESPONSE TO THE JQC MOTION TO STRIKE**

**COMES NOW**, the Honorable Terri-Ann Miller, by and through her undersigned counsel, and makes and files her Response to the JQC Motion to Stike as follows:

The Judicial Qualifications Commission (hereinafter referred to as JQC) asserts in its Motion to Strike Motion for Summary Judgment that a motion for summary judgment is an inappropriate procedural device in the context of Judicial Qualifications Commission proceedings.

**THERE IS NO SUCH PROCEDURAL DEVICE AS A MOTION TO STRIKE A MOTION FOR SUMMARY JUDGMENT:**

Initially, it is suggested that there is no such procedural device as a motion to strike a motion for summary judgment. Rule 1.140 (f) of the Fla.R.Civ.P. states that a party or the court may move to strike redundant,

immaterial, impertinent, or scandalous matters from any *pleading* (emphasis added) at any time. A motion for summary judgment is not a pleading, and a motion to strike a motion for summary judgment has not been contemplated by the Fla.R.Civ.P.

The propriety of a motion for summary judgment can be argued at the hearing on the motion for summary judgment. Secondly, the JQC does not cite one case where a court has stricken a plaintiff's, respondent's or defendant's motion for partial summary judgment or full summary judgment, in *any* JQC proceeding or otherwise.

By examination of the JQC website and dockets of other JQC matters we have been able to find motions for partial or summary judgment have been filed in 5 other JQC proceedings since 2000.[1]

## SUMMARY JUDGMENT IS STILL APPROPRIATE EVEN WHEN A COMPLAINT HAS SURVIVED A MOTION FOR DISMISSAL

The JQC suggests that since an Investigative Panel has already ruled that there is probable cause to believe that a violation of the Canons of the

[1] *In re: Holloway*, #00-143, SC00-2226, *In re: Cope*, # 01-244, SC01-2670 *In re: Henson*, #03-14, SC04-1, *In re: Barnes*, #05-437, SC06-2119, *In re: Eriksson*, #07-64, SC07-1648

Code of Judicial conduct has occurred, that a summary judgment is an illogical procedural device. To the contrary, a finding of probable cause by the Investigative Panel is more akin to a criminal proceeding where a grand jury has decided to indict a person. A criminal indictment, as with a JQC notice of formal charges which results after an Investigative Panel has found probable cause, is simply a plain, concise and definite written statement of the essential facts constituting the offense charged.

A sworn motion to dismiss pursuant to Fla. R. Crim. P. 3.190(c)(4), is the criminal equivalent of a civil motion for summary judgment. *State v. Hunwick*, 446 So.2d 214 (Fla. 4th DCA 1984). In a criminal matter, the bringing of an indictment does not preclude the filing or consideration by a court of a sworn motion to dismiss under Fla.R.Crim.P 3.190 (c)(4) after the parties have engaged in discovery or otherwise investigated the case further. In both a "(c)(4)" sworn motion and a motion for summary judgment it must be alleged that there are no materially disputed facts and the undisputed facts do not establish a *prima facie* case of guilt against the defendant or accused. The facts on which such motion is based must be specifically alleged and sworn to, similar to affidavits in support of a motion for summary judgment. They are both very similar motions and serve a useful purpose.

Additionally, an Investigative Panel, can find probable cause and decide to institute formal charges after a FJQCR 6(b) hearing whether or not the judge appears. Therefore, if a judge appears it cannot be said necessarily that the testimony of the judge did not refute the allegations, only perhaps that the testimony elicited at that time in addition to the facts believed at the time, gave rise to a vote finding probable cause, whether or not all the facts were actually discussed or actually known at that time.

A motion for summary judgment is usually at a point in the proceedings after which probable cause has been found, and after a motion to dismiss first tests whether a complaint or formal charge states a cause of action, based on the facts alleged in the four corners of the complaint or formal charge without inquiry concerning the truth of the allegations. *Odham v. Foremost Dairies*, 128 So.2d 586 (Fla. 1961). It can certainly turn out that as the facts are developed, there are no genuine issues as to the them, which then brings substantive principles of law into play. A motion for summary judgment tests the sufficiency of the facts to which substantive legal principles are applied. *Harvey Building v. Haley*, 175 So.2d 780 (Fla. 1965).

The JQC maintains that a summary judgment is inapplicable to disciplinary proceedings because this procedural device is reciprocal, and

the fact that the Commission has not used it to summarily convict a judge of unethical practices renders it inapplicable. It is suggested that there is no reason why the JQC could not file a motion for summary judgment in certain cases. For example, if formal charges are filed, and no answer is filed by a respondent judge, there is no legal reason why the JQC could not move for a summary judgment.

Florida Bar disciplinary proceedings are in many respects similar to JQC actions. Summary judgment is available in attorney disciplinary proceedings, *The Florida Bar v. Daniel*, 626 So.2d 178, 182 (Fla. 1993).

The JQC maintains that even if evidence is uncontroverted, if it is susceptible to varied conclusions, then summary judgment is not properly employed. *Smith v. City of Daytona*, 121 So.2d 440 (Fla. 1960). But this case cited as well as the others cited by the JQC were cases wherein motions for summary judgment had gone to hearing. As such, this is an argument to be made at a summary judgment hearing, but these cases do not stand for the proposition that summary judgment is not available as a procedural device in a judicial disciplinary proceeding.

The remainder of the JQC's assertions in its Motion to Strike will not be addressed as they are also better suited as argument which might be offered during a hearing on the Respondent's Motion for Summary

Judgment itself.

## CONCLUSION

We move the Chair of the Hearing Panel to rule upon the Motion for Summary Judgment and not strike it.

WHEREFORE**,** The Honorable Terri-Ann Miller respectfully requests that the Chair of the Hearing Panel issue an Order granting Final Summary Judgment in favor on all counts of the Second Amended Notice of Formal Charges.

Dated this 23rd day of February, 2009.

Respectfully submitted:

/s/_____

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished as listed below this 23rd day of February, 2009, to the following:

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Also, per Rules 9, and 10 of the Florida Judicial Qualifications Commission, all of our pleadings are being filed as follows:

Original and one copy to the Clerk of the Florida Supreme Court by US Mail. An electronic copy will be sent to the Clerk of the Court per Supreme Court Rule: AOSC04-84. Email to: e-file@flcourts.org

A copy will be sent directly to the Chair of the Hearing Panel, Judge Jesse Preston Silvernail, 2825 Judge Fran Jamieson Way, Viera, FL 32940 by US Mail.

An additional 5 copies will be sent to the JQC c/o Mr. Schneider to be distributed to the full hearing panel.

By: _____
Michael A. Catalano, Esq.

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